

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
2006 Quadrennial Regulatory Review –)	MB Docket No. 06-121
Review of the Commission’s Broadcast)	
Ownership Rules and Other Rules Adopted)	
Pursuant to Section 202 of the)	
Telecommunications Act of 1996)	
)	
2002 Biennial Regulatory Review – Review of)	MB Docket No. 02-277
the Commission’s Broadcast Ownership Rules)	
and Other Rules Adopted Pursuant to Section)	
202 of the Telecommunications Act of 1996)	
)	
Cross-Ownership of Broadcast Stations and)	MM Docket No. 01-235
Newspapers)	
)	
Rules and Policies Concerning Multiple)	MM Docket No. 01-317
Ownership of Radio Broadcast Stations in)	
Local Markets)	
)	
Definition of Radio Markets)	MM Docket No. 00-244
)	
Ways to Further Section 257 Mandate to Build)	MB Docket No. 04-228
on Earlier Studies)	
)	
Public Interest Obligations of TV Broadcast)	MM Docket No. 99-360
Licensees)	

OPPOSITION TO PETITION FOR RECONSIDERATION

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SUMMARY

Gannett Co., Inc. (“Gannett”) opposes the Petition for Reconsideration (“Petition”) filed in these proceedings by Common Cause, *et al.* (“Petitioners”). In less than four pages of their 23-page pleading, Petitioners object to grant of Gannett’s requested waiver of the newspaper-broadcast cross-ownership (“NBCO”) rule to permit continued common ownership of KPNX(TV) and *The Arizona Republic*. Procedurally, Petitioners are time-barred from attacking the grant of Gannett’s license renewal and waiver request. Substantively, Petitioners fail to present any reason sufficient to reverse the Commission’s decision as it concerns Gannett’s Phoenix media outlets.

Petitioners allege that interested parties did not have notice of the Commission’s intent to act on pending waiver requests in the *2008 Order*, and were afforded inadequate opportunity to dispute whether Gannett’s existing newspaper/broadcast combination serves the public interest. Petitioners are incorrect. Gannett’s waiver request was pending for almost two years and interested parties were afforded requisite notice and ample opportunity to object. Petitioners failed to advance any protest and are now foreclosed from resurrecting their rights concerning the Phoenix waiver in the instant proceeding.

Specifically, consistent with the Commission’s rules and established precedent, Gannett’s NBCO waiver request was appropriately filed with the KPNX license renewal application on May 31, 2006. No one—including Petitioners—opposed it. In the *2008 Order*, the Commission granted Gannett’s waiver request. Soon after, the KPNX license renewal application was granted. Public notice was released, and the renewal grant was uncontested. As the D.C. Circuit has affirmed, grant of a waiver request is interlocutory in nature, and the Commission’s rules clearly state that petitions for reconsideration of interlocutory actions will not be entertained.

Grant of Gannett's waiver only ripened as a final action in the context of KPNX's renewal application, which Petitioners' did not contest. Petitioners' attempt to lodge a protest against Gannett's waiver in the instant proceeding, therefore, is procedurally infirm, as Petitioners are asking the Commission to reconsider an agency ruling that is not directly reviewable. Thus, their objections as they pertain to Gannett's waiver must be dismissed.

Regardless, the Commission's determination that continued common ownership of KPNX and *The Arizona Republic* is consistent with the public interest was well-reasoned, firmly grounded in precedent and supported by record evidence. Gannett unequivocally demonstrated the public interest benefits accruing to Phoenix readers and viewers as a result of its common ownership of the television station and newspaper. Neither Petitioners nor any other party has rebutted the facts that support the conclusion that no harm to diversity, localism and competition has resulted from Gannett's common ownership. To the contrary, as the Commission itself has noted, the "critically-acclaimed Phoenix combination, [] provides more and better local news, including lengthy investigative reports, while retaining separate editorial viewpoints." Forced divestiture would serve only to deprive the Phoenix community of the tangible benefits resulting from the synergies created by Gannett's media outlets, most notably the well-documented increase in local, in-depth news coverage available through the newspaper, on television, and via Gannett's Phoenix website.

The Commission should, therefore, reject Petitioners' arguments and affirm its decision with respect to Gannett.

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OPPOSITION TO PETITION FOR RECONSIDERATION

Gannett Co., Inc. (“Gannett”) opposes the Petition for Reconsideration (“Petition”) filed in the above-captioned proceedings by Common Cause, the Benton Foundation, Consumers Action, Massachusetts Consumers’ Coalition, NYC Wireless, James J. Elekes, and National

Hispanic Media Coalition (collectively, "Petitioners").¹ Petitioners ask the Commission to reconsider certain aspects of the *2008 Order*.² In less than four pages of a 23-page pleading, Petitioners object to the Commission's grant of waivers to certain parties, including grant of Gannett's requested waiver to permit its continued common ownership of KPNX(TV) and *The Arizona Republic*. In large part, Petitioners' arguments relating to the Phoenix waiver stem from the premise that interested parties had no notice of the Commission's intent to act on pending waiver requests in the *2008 Order* and were afforded inadequate opportunity to dispute whether certain existing newspaper/broadcast combinations serve the public interest. This premise is, however, incorrect. As we describe below, the public had more than adequate notice regarding the Phoenix waiver request, which was pending for almost two years and was completely unopposed. In fact, consistent with the Commission's rules and established precedent, Petitioners were required to contest the waiver in the context of the KPNX license renewal application, offer no justification for not doing so, and are now procedurally barred from seeking reconsideration.

Petitioners further suggest that the Commission failed to apply appropriate waiver criteria, which is also incorrect. The Commission's determinations were well-reasoned, firmly grounded in precedent and supported by extensive showings made by Gannett.

¹ The Petition was filed on March 24, 2008, and notice of its filing was published in the Federal Register on April 21, 2008. See 73 Fed. Reg. 21347 (Apr. 21, 2008). This opposition is timely filed pursuant to Section 1.429(f) of the Commission's Rules, 47 C.F.R. § 1.429(f).

² 2006 Quadrennial Regulatory Review-Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *et al.*, Report and Order and Order on Reconsideration, FCC 07-216, MB Docket Nos. 06-121, *et al.* (rel. Feb. 4, 2008) ("*2008 Order*").

Petitioners' request that the Commission reverse its decision to grant to Gannett a permanent waiver of the newspaper-broadcast cross-ownership ("NBCO") with respect to its Phoenix combination should, therefore, be rejected.³

I. THE PUBLIC HAD SUFFICIENT NOTICE OF THE PHOENIX WAIVER REQUEST

Since acquiring *The Arizona Republic* in August 2000, Gannett has owned both KPNX and the daily newspaper pursuant to the policy set forth in footnote 25 of the FCC's 1975 decision adopting the NBCO rule.⁴ On May 31, 2006, consistent with the Commission's policy governing so-called footnote 25 applicants and NBCO, Gannett timely filed a license renewal application for KPNX, which included a waiver request demonstrating the public interest benefits associated with continued common ownership of Gannett's Phoenix media outlets.⁵ The waiver request included a detailed substantive discussion of Gannett's Phoenix newspaper/broadcast operations, as did numerous comments and reply comments filed by Gannett in every stage of the Commission's media ownership proceedings since 2001,⁶ and before the Third Circuit in *Prometheus Radio Project v. FCC*.⁷

³ While Gannett will confine its arguments herein to Petitioners' challenge to the Phoenix waiver, Gannett disputes Petitioners' assertions that the NBCO should be modified on reconsideration, and concurs with the arguments advanced by the Newspaper Association of America ("NAA") in its Opposition to Petition for Reconsideration filed in the instant proceedings. Gannett submits that the record in these proceedings required repeal or further relaxation of the NBCO. To that end, Gannett has filed a petition for review of the 2008 Order in the United States Court of Appeals for the District of Columbia Circuit. *Gannett Co., Inc. v. FCC*, Case No. 08-1101 (D.C. Cir. filed Mar. 5, 2008) (consolidated with *Newspaper Ass'n of America, et al. v. FCC*, Nos. 08-1082, et al.).

⁴ *Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, 50 F.C.C.2d 1046, 1076 n.25 (1975) *aff'd sub nom. FCC v. Nat'l Citizens Comm. For Broad.* 436 U.S. 775 (1978) ("1975 Order"). Footnote 25 provides that when a television station purchases one or more daily newspapers in the same market as its station, it may own both the television station and the newspaper(s) for one year or until the expiration date of the station's license, whichever is later.

⁵ *Application for Renewal of License KPNX-TV*, Mesa, AZ, File No. BRCT-20060531ACB, et al. (MB May 31, 2006).

⁶ See Comments of Gannett Co., Inc., MB Docket 06-121 (Dec. 11, 2007); Reply Comments of Gannett Co., Inc., MB Docket 06-121 (Jan. 16, 2007); Comments of Gannett Co., Inc., MB Docket 06-121 (Oct. 26, 2006) ("Gannett

Gannett complied with the Commission's rules prescribing that the public be given notice of the filing of the KPNX license renewal application, including instruction as to how to lodge with the FCC objections regarding the licensee's performance during the license term.⁸ The renewal application was accepted for filing in the ordinary course and appeared on public notice on June 5, 2006.⁹ It remained pending for some 21 months. Not a single petition to deny, informal objection or any other comment regarding the KPNX license renewal application or the accompanying waiver request was filed.

In its *2008 Order*, the Commission granted Gannett's Phoenix waiver request.¹⁰ Soon after, the KPNX license renewal was granted. Public notice of the renewal grant was released on March 6, 2008.¹¹ No party challenged the grant. The time for filing petitions for reconsideration or applications for review expired on April 7, 2008, and the renewal grant has now become a final order.¹²

Against this backdrop, Petitioners' assertion that the Commission granted Gannett's waiver request and others "without seeking any public comment on whether these waivers were

Comments"); Reply Comments of Gannett Co., Inc., MB Docket 02-277 (Feb. 3, 2003); Comments of Gannett Co., Inc., MB Docket 02-277 (Jan. 2, 2003); Reply Comments of Gannett Co., Inc., MB Docket 01-235 (Feb. 15, 2002); Comments of Gannett Co., Inc., MB Docket 02-277 (Dec. 13, 2001).

⁷ Brief for Intervenors Newspaper Association of America, Belo Corp., Gannett Co., Inc., and Morris Communications Company, LLC, *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004)(Nos. 03-3388 (consolidated)).

⁸ 47 C.F.R. § 73.3580(d)-(f).

⁹ See *Broadcast Applications, Application of Multimedia Holdings Corp.*, Public Notice, Report No. 26249 at 10 (June 5, 2006), available at http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-265745A1.pdf.

¹⁰ *2008 Order* at ¶ 77.

¹¹ See *Broadcast Actions, Application of Multimedia Holdings Corp.*, Public Notice, Report No. 46687 at 7 (Mar. 6, 2008), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-280630A1.pdf.

¹² 47 C.F.R. § 1.117.

in the public interest,”¹³ is clearly incorrect. Petitioners had multiple opportunities to challenge the Phoenix waiver request over the course of more than two years and did not avail themselves of any such opportunity. In particular, Petitioners could have filed a petition for reconsideration of the KPNX renewal grant *even after* the *2008 Order* was released, and chose not to do so.¹⁴

II. PETITIONERS ARE NOW PROCEDURALLY BARRED FROM CHALLENGING THE COMMISSION’S GRANT OF GANNETT’S WAIVER

To the extent it contests grant of the Phoenix waiver, the Petition is procedurally improper. As demonstrated below, any objection to the waiver necessarily must have been lodged in the context of the KPNX license renewal application. Petitioners failed to advance any such objection there, and their objection is now time-barred. Consistent with its rules and established precedent, the Commission must reject Petitioners attempt to resurrect their rights concerning the Phoenix waiver in the instant proceeding.

While the Commission’s rules provide that interested parties may petition for reconsideration of a final action in a rulemaking proceeding,¹⁵ the Commission’s decision to grant Gannett’s requested waiver of the NBCO rule in the *2008 Order* was not in and of itself a reviewable final action.¹⁶ Rather, the Commission has made clear that “a licensee’s waiver

¹³ Petition at 9. In fact, interested parties challenged other license renewal applications containing NBCO waiver requests. *See* Common Cause South Carolina and Free Press Pet. To Den. Renewal of Station License WBTW, Florence, South Carolina (Nov. 1, 2004); NAACP and Free Press Mot. To Dismiss or in the Alternative Pet. To Den. Renewal of Station License WMBB-TV, Panama City, Florida (Jan. 3, 2005); Free Press Mot. to Dismiss or In the Alternative Pet. to Den. Station License WRBL(TV), Columbus, Georgia (Mar. 1, 2005); and Free Press Informal Objection for Renewal of Station License WJHL-TV, Johnson City, Tennessee (July 1, 2005). In addition, Petitioners’ counsel filed an Application for Review of the Media Bureau’s grant of the above-referenced renewal applications on April 24, 2008. Free Press and NAACP App. For Review (April 24, 2008).

¹⁴ *See infra* text accompanying notes 22-23.

¹⁵ 47 C.F.R. § 1.429(a).

¹⁶ *See Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (holding an agency’s action is final and reviewable only if, *inter alia*, it “mark[s] the ‘consummation’ of the agency’s decisionmaking process ... it must not be of a merely tentative or interlocutory nature”) (internal citations omitted). *See also, e.g., N. Am. Catholic Educ. Programming Found., Inc., v. FCC*, 437 F.3d 1206, 1209 (D.C. Cir. 2006) (“NACEPF”).

petition (and the FCC's decision on it) is incident to a larger licensing proceeding,"¹⁷ as it was here. Grant of Gannett's waiver request was a "logically necessary prerequisite" to the Commission's decision to grant the KPNX licensing application.¹⁸ Without the waiver decision, Gannett could not have received an unconditional grant of its license renewal application, because the NBCO otherwise precluded continued common operation of its Phoenix newspaper and television station.

As the D.C. Circuit has affirmed, a waiver decision does not "mark the consummation of the agency's decisionmaking process," and is interlocutory in nature.¹⁹ Section 1.106(a)(1) of the Commission's rules clearly states that petitions for reconsideration of interlocutory actions will not be entertained.²⁰ Petitioners are asking the Commission to reconsider an agency "ruling not directly reviewable,"²¹ and its objections as they pertain to Gannett's waiver should be dismissed because they were not timely advanced in the KPNX license renewal proceeding.

Grant of Gannett's waiver only ripened as a final action in the context of KPNX's renewal application, and Petitioners are now precluded from seeking reconsideration of the Commission's renewal decision. As described above, the KPNX license renewal application first appeared on public notice on June 5, 2006. Pursuant to the Commission's rules, interested

¹⁷ See *id.* at 1209 (citing *Amendment of Part 74 of the Commission's Rules and Regulations in regard to the Instructional Television Fixed Service*, Report and Order, 98 F.C.C.2d 925, 933 (1984)).

¹⁸ *Id.* at 1210.

¹⁹ *Id.* (quoting *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948)).

²⁰ 47 C.F.R. § 1.106(a)(1).

²¹ *Consumer Fed'n of America v. FCC*, 348 F.3d 1009, 1011 (D.C. Cir. 2003).

parties had until September 1, 2006 to file a petition to deny the license renewal.²² The KPNX license renewal application remained pending for almost two years and was uncontested.

Following grant of the Phoenix waiver in the *2008 Order* released February 4, 2008, the Media Bureau took action on the KPNX renewal application. Grant of the application appeared on public notice on March 6, 2008 and, as mandated by statute, the time for filing petitions for reconsideration or applications for review of the grant of the application expired thirty days later (on April 7, 2008), without any filing by Petitioners.²³ Pursuant to Section 1.117 of the rules, the Commission had 10 additional days to reverse the grant *sua sponte* and did not do so. Thus, grant of the renewal became a “final order” on April 15, 2008.

Petitioners do not acknowledge their duty to have come forward with concerns about Gannett’s Phoenix combination in the license renewal proceeding, much less provide a basis for their failure to do so.²⁴ As demonstrated above, Petitioners’ duty was to seek the appropriate

²² 47 C.F.R. § 73.3584(a). Further, given existing Commission policy, interested parties could have filed an informal objection at any time throughout the application’s pendency. 47 C.F.R. § 73.3585.

²³ Under the express terms of the Communications Act, petitions for reconsideration must be filed within thirty days from the date upon which public notice is given of the order. The Commission may only waive or extend the thirty-day filing period where the late filing is due to the Commission’s failure to give parties customary notice of the action of which reconsideration is sought. *Reuters Ltd. v. FCC*, 781 F.2d 946, 951-52 (D.C. Cir. 1986) (finding that the Commission acted beyond its lawful authority when it entertained belated petition for reconsideration). *See also WKBH Television, Inc.*, 1 RR 2d 760 at ¶ 6 (1964) (finding that notice was widely disseminated and petitioners “slept on such rights as they might have had”). Such “extremely unusual circumstances” are not alleged, and do not exist here, as the Commission duly provided public notice of the pendency and grant of the renewal application consistent with its ordinary practices.

²⁴ Section 1.106 of the Commission’s rules set forth the requirements that parties and other interested persons must satisfy to seek reconsideration of a final Commission action. Subsection (b)(1) of that rule provides in pertinent part that persons seeking reconsideration of a Commission action who are not already parties to the proceeding must “show good reason why it was not possible for [them] to participate in the earlier stages of the proceeding.” 47 C.F.R. § 1.106(b)(1). As demonstrated above, Petitioners had notice of the pendency of the license renewal application and its grant, yet failed to participate or to justify their failure to do so. *See Heritage Cablevision Associates of Dallas, L.P. v. Texas Utilities Electric Company*, 7 FCC Rcd 4192 at ¶ 7 (1992) (statement that Petitioner was “unaware” that action was pending before the Commission until after pleading cycle was completed fell short of the showing necessary to demonstrate an inability to participate).

administrative remedy available to them before the Commission.²⁵ Petitioners were given the notice to which they were entitled and neglected to avail themselves of such opportunities. The deadline for filing petitions for reconsideration is statutory and cannot be waived by the Commission.²⁶ Thus, Petitioners are now foreclosed from raising the questions regarding the Gannett waiver that they endeavor to present here.

Petitioners' assertions that it was improper to grant the waiver in the context of a rulemaking and that the Commission provided little public notice of its intent to grant waivers therein are also flawed, and do not excuse their failure to preserve their rights in the context of the KPNX renewal application. It is not improper or unusual for the Commission to grant waivers or otherwise grandfather certain ventures within the context of a rulemaking proceeding, and it is well within the Commission's discretion to do so for efficiency's sake.²⁷ Administrative agencies commonly accommodate existing operations when making a policy change that could significantly affect regulated entities.²⁸ It is axiomatic that grandfathering or waiver grants may

²⁵ *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 27 (D.C. Cir. 1941) (finding that a party "should not be entitled to sit back and wait until all interested persons who do so act have been heard, and then complain that [it] has not been properly treated" by the Commission).

²⁶ See *Heritage Cablevision Associates of Dallas*, 7 FCC Rcd 4192 at ¶ 9 (1992) (noting that "except where the Commission fails to provide notice of its decision to parties as required by its rules, [it] lack[s] authority to extend or waive the statutory 30-day filing period specified in Section 405" of the Act).

²⁷ See, e.g., *Review of the Commission's Regulations Governing Television Broadcasting*, 14 FCC Rcd 12903, 12965 (¶ 146) (1999) (television LMAs); *id.* at n.97 (television duopolies); *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, Report and Order, 14 FCC Rcd 12559, 12630 (¶ 168) (1999) (cable/broadcast combinations and cable/MDS combinations); *1975 Order at 1054* (¶ 30) (newspaper/broadcast combinations except in limited "egregious" cases).

²⁸ See, e.g., *Revision of Radio Rules and Policies*, First Order on Reconsideration, 7 FCC Rcd 6387, 6397 (¶ 48) (1992) (declining to restrict the transfer of station groups that were acquired in compliance with the audience share limit adopted in the FCC's Order but later grew to a level exceeding that limit, because the agency's goal had been "to promote robust competition," and "penalizing enterprises that grow into stronger competitors [was] [in]consistent with this objective"); *Revision of Radio Rules and Policies*, Second Memorandum Opinion and Order, 9 FCC Rcd 7183, 7193 (¶ 57) (1994) (permitting transfers of radio time brokerage agreements that were allowable under the FCC's prior rules but impermissible under its revised regulations, acknowledging that "[t]o hold

appropriately be used to smooth the transition to a new regulatory regime. Indeed, the grandfathering of existing newspaper/broadcast combinations was an integral part of the 1975 Order that put the NBCO rule in place.²⁹

Every party to the instant proceedings reasonably should have anticipated that the Commission's decision could involve action on related matters, such as long-pending waiver requests associated with license renewal applications. In fact, the record in the instant proceeding is replete with discussion of existing newspaper/broadcast combinations and the uncertain status of some.³⁰ The future of several cross-owned combinations was inextricably linked with the outcome of the media ownership proceeding, whether in the form of repeal of the rule, grant of temporary waivers, action on pending waivers, or licensing decisions.³¹ For

otherwise, as a general matter, could severely and unnecessarily restrict the marketability of stations and station combinations that involve brokerage agreements and seriously undermine the utility of such agreements").

Moreover, the Administrative Procedure Act ("APA") does not require an agency to specify every action it proposes to take before it adopts a rulemaking order. As the courts have stated, such a standard would be antithetical to notice and comment proceedings. *Crawford v. FCC*, 417 F.3d 1289, 1295 (D.C. Cir. 2005) ("the notice-and-comment requirements presume that the contours of the agency's final rule may differ from those of the rule it initially proposes in an NPRM."); see also *Covad Commc'ns Co. v. F.C.C.*, 450 F.3d 528 (D.C. Cir., 2006); *Sprint Corp. v. FCC*, 315 F.3d 369 (D.C. Cir. 2003). Grant of Gannett's long-pending waiver request was simply a logical outgrowth of the Commission's modification of the NBCO.

²⁹ 1975 Order at 1085 (¶ 119).

³⁰ See, e.g., Comments of Gannett Co., Inc., MB 06-121, (filed Oct. 23, 2006); Comments of Morris Communications Company, MB Docket 06-121, 13-21 (filed Oct. 23, 2006); Comments of Bonneville International Corporation, MB Docket 06-121 (filed Oct. 23, 2006); Comments of Shamrock Communications Inc. and Scranton Times, L.P., MB Docket 06-121 (filed Oct. 23, 2006); Comments of Cox Enterprises, Inc., MB Docket 06-121 (filed Oct. 23, 2006); Comments of Media General, Inc., MB Docket 06-121, at 4 (filed Oct., 23, 2006); Comments of Belo Corp., MB Docket 06-121 (filed Oct. 23, 2006); Comments of Tribune Company on Further Notice of Proposed Rulemaking, MB Docket 06-121 (filed Oct. 23, 2006).

³¹ See, e.g., *Shareholders of Tribune Company and Sam Zell, For Consent to the Transfer of Control of the Tribune Company and Applications for the Renewal of License KTLA(TV)*, FCC 07-211, MB Docket No. 07-119 (MB Nov. 30, 2007); *Application For Renewal Of Broadcast Station License, KPNX-TV, Mesa, AZ*, File No. BRCT-20060531ACB, et al. (MB May 31, 2006); *Application for Renewal of License WBTW(TV)*, Florence, SC, File No. BRCT - 20040802BIK (MB Aug. 2, 2004); *Application for Renewal of License WMBB(TV)*, Panama City, FL, File No. BRCT - 20041001AQF (MB Oct. 1, 2004); *Application for Renewal of License WRBL(TV)*, Columbus, GA, File No. BRCT - 20041201BZP (MB Dec. 1, 2004); *Application for Renewal of License WJHL-TV*, Johnson City, TN, File No. BRCT - 20050401BYS (MB April 1, 2005); *Application for Renewal of License WHIO-TV*, Dayton,

Petitioners, who have been intimately involved in the media ownership proceedings in recent years,³² to allege that the Commission blindsided them by granting waivers in the context of its order is disingenuous. The Commission properly chose to address waiver requests filed by Gannett and others in the context of a single related order. This choice was eminently reasonable and within the discretion of the Commission.³³ Regardless, the public was clearly advised of the filing and grant of the KPNX renewal application as required by the Act and the rules, and the Commission's public notices should have put diligent, interested parties such as Petitioners notice that their rights were at stake.³⁴

Were the Commission to accept Petitioners' alleged "surprise" at the grant of the waivers within the *2008 Order* as sufficient justification for a new party to seek reconsideration of the renewal grant, "the Commission's – and indeed the public's – interest in the finality of licensing

OH, File No. BRCT - 20050531AWI (MB May 31, 2005); *see also* Comments of Bonneville International Corporation, MB Docket 06-121, *et. al.*, 1 n.1 (filed Oct. 23, 2006); Comments of Cox Enterprises, Inc. MB Docket 06-121, *et. al.*, 3-4 (filed Oct. 23, 2006); Comments of Morris Communications Company, LLC, MB Docket No. 06-121, *et. al.*, 13-21 (filed Oct. 23, 2006); Comments of Shamrock Communications Inc. and The Scranton Times, L.P., MB Docket 06-121, *et. al.*, 1 n.1 (filed Oct. 23, 2006).

³² *See, e.g.*, Comments on Chairman Martin's Proposal by Office of Communication of United Church of Christ, Inc., National Organization for Women, Media Alliance, Common Cause, Benton Foundation, Consumers Action, Massachusetts Consumers' Coalition, NYC Wireless, Democracy Now, Wayne Caswell, and James J. Elekes, MB Docket 06-121 (filed Dec. 11, 2007); Reply Comments of National Hispanic Media Coalition, MB Docket 06-121 (filed Oct. 31, 2007); Reply Comments of Office of Communication of United Church of Christ, Inc., National Organization for Women Foundation, Media Alliance, Common Cause, Benton Foundation, MB Docket 06-121 (filed Jan. 16, 2007); Statement of Chellie Pingree, president and CEO of Common Cause, MB 02-277 (filed May 26, 2003).

³³ *See, e.g.*, *Petition for Waiver of the Commission's Price Cap Rules for Services Transferred from VADI to the Verizon Telephone Companies*, Order, 22 FCC Rcd. 10259, 10265 n.48 (2007) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947)); *Exchange Network Facilities for Interstate Access Allnet Communication Service v. AT&T*, 1 FCC Rcd. 618, ¶ 60 (1986) (same). Furthermore, as the court stated in *United States Telecommunications Ass'n v. FCC*, 359 F.3d 554, 588 (D.C. Cir., 2004), "[t]he FCC generally has broad discretion to control the disposition of its caseload, and to defer consideration of particular issues to future proceedings when it thinks that doing so would be conducive to the efficient dispatch of business and the ends of justice." (citations omitted)

³⁴ *See, e.g. McElroy Elecs. Corp. v. FCC*, 86 F.3d 248, 257-58 (D.C. Cir. 1996).

decisions would be eviscerated.”³⁵ Any decision to revisit the grant of KPNX’s license renewal application would significantly undermine the concept of administrative finality, which recognizes that “investments may be made in reliance on” a final government action, and that, at some point, “the public interest in finality is dominant over the public interest in possibly improving the administrative result on further reconsideration.”³⁶

Alternatively, should the Commission be inclined to entertain Petitioners’ arguments regarding Gannett’s Phoenix waiver in the context of review of the *2008 Order*, the Petition as it concerns grant of Gannett’s waiver request was not timely filed. As described above, grant of the waiver within the rulemaking order was “ancillary to the ultimate licensing decision”³⁷ and is, therefore, appropriately characterized as a licensing, not a rulemaking, decision. Section 1.106 of the Commission’s rules, 47 C.F.R. § 1.106, provides that parties who wish to request reconsideration of a licensing decision file within 30 days of release of that decision.³⁸ Under Section 1.106, then, Petitioners were required to challenge that portion of the *2008 Order* granting the Phoenix waiver on or before March 5, 2008, and failed to do so.

III. THE COMMISSION APPROPRIATELY APPLIED ESTABLISHED WAIVER CRITERIA AND ADEQUATELY JUSTIFIED GRANT OF GANNETT’S REQUEST

In the *2008 Order*, the Commission granted a limited number of pending waiver requests to permit the continuance of existing combinations of a newspaper and a single broadcast

³⁵ *Comm. for Cmty. Access v. FCC*, 737 F.2d 74, 84 (1984).

³⁶ *See Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 289 (D.C.Cir.1971). *See also, e.g., JEM Broad Co., v. FCC*, 22 F.3d 320, 325 (D.C. Cir. 1994) (“We place a high value on finality in administrative processes, for finality ‘conserve[s] administrative resources and protect[s] the reliance interests of regulates who conform their conduct to the regulations.’”) (citations omitted, alteration in original).

³⁷ *NACEPF at 1209*.

³⁸ 47 C.F.R. § 1.106. *See also* 47 C.F.R § 1.115 (governing procedures to file an application for review).

station³⁹ that were formed by acquisitions occurring after the date of the broadcast station's last renewal, including Gannett's. It found that the public interest would be served by such waivers, and "grandfathered" the combinations "in the same manner as the Commission did in 1975."⁴⁰

The Commission's determinations regarding common ownership of KPNX and *The Arizona Republic* were firmly grounded in precedent set by the *1975 Order* as well as subsequent permanent waiver grants,⁴¹ and supported by extensive showings made by Gannett in the KPNX renewal application as well as in the exhaustive record compiled in the protracted media ownership proceedings. The Commission ultimately determined that a waiver was warranted "in light of the synergies that have already been achieved from the newspaper/broadcast station combination, the new services provided to local communities by the combination, the harms associated with required divestitures, the prolonged period of uncertainty surrounding the status of the newspaper/broadcast cross-ownership ban, and the length of time that the waiver request has been pending."⁴²

The *2008 Order* made clear that the Commission evaluated Gannett's existing newspaper/broadcast combination to determine whether divestiture was appropriate in light of its decision to adopt the cross-ownership ban, in the same manner the Commission did in the context of the *1975 Order*. Over the years, the Commission has recognized that waivers might be appropriate where: (1) given the size of the market and the size and type of newspaper and

³⁹ *2008 Order* at ¶ 77.

⁴⁰ *Id.*

⁴¹ *1975 Order*; cf. *Kortes Communications, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 11846 (2000); *Columbia Montour Broad. Co., Inc.*, 13 FCC Rcd 13007 (1998); *Fox Television Stations, Inc.*, 8 FCC Rcd 5341 (1993), *aff'd sub nom. Metrop. Council of NAACP Branches v. FCC*, 46 F.3d 1154 (D.C. Cir. 1995); *Field Communications Corp.*, 65 F.C.C.2d 959 (1977).

⁴² *2008 Order* at ¶ 77.

broadcast outlet involved, sufficient diversity and competition would remain if a combination were allowed; or (2) the purposes of the rule would be disserved by divestiture.⁴³ In the 2008 Order, the Commission clearly applied the standard explicitly contained in the 1975 Order, which supports grant of a cross-ownership waiver “if it could be shown for whatever reason that the purposes of the rule would be disserved by divestitures, if the rule, in other words, would be better served by the continuation of the current ownership pattern.”⁴⁴

Gannett unequivocally demonstrated the public interest benefits accruing to Phoenix readers and viewers as the result of its common ownership of KPNX and *The Arizona Republic*. While Petitioners’ attempt to characterize Gannett’s well-supported assertions as “self-serving claims,” extensive information concerning the Phoenix combination is contained in the record, and neither Petitioners nor any other party has rebutted the facts which demonstrate that no harm to diversity, localism, and competition has resulted in the Phoenix market. The Commission noted in support of its decision to grant Gannett’s permanent waiver that the “critically-acclaimed Phoenix combination, [] provides more and better local news, including lengthy investigative reports, while retaining separate editorial viewpoints.”⁴⁵

The Commission also specifically considered the harm that would result from forced divestiture, reiterating that “divestiture introduces the possibility of disruption for the industry

⁴³ Specifically, the Commission has repeatedly stated, “While we did not intend to relitigate issues considered and rejected when the newspaper-broadcast cross-ownership rules were adopted, we noted that the parties could bring to the Commission’s attention whatever special circumstances they thought had a bearing on the appropriateness of granting waiver.” *In re Crosby N. Boyd, Godfrey W. Kauffmann, John M. Kauffmann, Willmott Lewis, Jr., et al. and Perpetual Corporation Of Delaware For Transfer of De Facto Control of Washington Star Communications, Inc., parent of the licensees of Station WCIV(TV), Charleston, South Carolina, Stations WMAL, WMAL-FM and WMAL-TV, Washington, D.C. (The Evening Star Broadcasting Company); and Stations WLVA and WLVA-TV, Lynchburg, Virginia (WLVA, Incorporated)*, 54 F.C.C.2d 669 at ¶ 8 (1975). See also *Newspaper/Radio Cross Ownership Waiver Policy*, Notice of Inquiry, 11 FCC Rcd 13004-05 (¶ 3) (1996).

⁴⁴ 1975 Order at 1085 (¶ 119).

⁴⁵ 2008 Order at ¶ 40.

and hardship for individual owners.”⁴⁶ Again, Gannett has provided the Commission with extensive information regarding how the forced sale of one of its Phoenix media properties would create an “unduly harsh” result.⁴⁷ Phoenix viewers and readers would be deprived of the substantial benefits resulting from the synergies created by Gannett’s combination, most notably the well-documented increase in local, in-depth news coverage available through the newspaper, on television, and via Gannett’s Phoenix website, as well as the expansion of news sources available to Phoenix’s rapidly growing Hispanic community. Further, the Commission recognized that, considering the fragile state of the newspaper industry, such a divestiture would be particularly ill-advised.⁴⁸

In addition, the Commission considered how long Gannett’s Phoenix combination had been in existence. In the *1975 Order*, the Commission specifically stated that “stability and continuity of ownership do serve important public purposes.”⁴⁹ Thus, it was appropriate for the Commission to consider the longevity of Gannett’s Phoenix combination when determining

⁴⁶ *Ownership Order* at ¶ 77 (citing *1975 Order* at 1078 (¶ 109)). Petitioners attempt to distort the Commission’s Footnote 25 policy by asserting that Gannett had “full knowledge ... that they would be required to divest before license renewal.” Petition at n. 29. That is far from the case. Gannett was entitled under the Commission’s procedures to file the waiver request in connection with its license renewal, see *Newspaper/Radio Cross Ownership Waiver Policy*, 11 FCC Rcd 13004-05 (¶ 3), and, given existing precedent and the uncertainty surrounding the fate of the NBCO, the company had a reasonable expectation that continued common ownership would be permitted at least until some time after resolution of the ownership proceedings, if not permanently. In fact, had the Commission’s July 2003 Report and Order revising the cross-ownership been affirmed, cross-ownership of KPNX and *The Arizona Republic* would have been permissible given the presence of eighteen full-power and noncommercial television stations operating in the Phoenix DMA at the time. *Gannett Co., Inc. Waiver Request, appended as Attachment 14 to Application For Renewal Of Broadcast Station License, KPNX-TV, Mesa, AZ*, File No. BRCT-20060531ACB, et al. (MB May 31, 2006), citing BIA Financial Network, Investing in Radio Market Report 2005 (4th ed. Summer 2005) and BIA Financial Network, Investing in Television Market Report 2005 (1st Ed. Feb. 2005 ratings).

⁴⁷ *Newspaper/Radio Cross Ownership Waiver Policy*, 11 FCC Rcd at 13005 (¶ 4); *Gannett Co., Inc. Waiver Request, appended as Attachment 14 to Application For Renewal Of Broadcast Station License, KPNX-TV, Mesa, AZ*, File No. BRCT-20060531ACB, et al. (MB May 31, 2006).

⁴⁸ *2008 Order* at ¶ 27-33.

⁴⁹ *1975 Order* at 1078 (¶ 109).

whether it should grant a waiver to allow continued common ownership under the existing standard.

The Commission need not explicate every detail in the record that led it to conclude that grant of Gannett's waiver request served the public interest. Under the APA, the Commission is required to "examine the relevant data and articulate a satisfactory explanation for its action."⁵⁰ The Commission has more than adequately justified its grant of Gannett's renewal request.⁵¹

IV. CONCLUSION

The Commission should reject Petitioners' arguments and affirm its decision with respect to Gannett. Procedurally, Petitioners are foreclosed from attacking the Commission's grant of Gannett's renewal and waiver request. Substantively, Petitioners have failed to present any sufficient reason to reverse the Commission's decision to grant a permanent waiver to allow continued common ownership of Gannett's Phoenix newspaper and television station. The Commission followed established precedent, its actions were within its discretion, and grant of the waiver was fully supported by a record that unequivocally established that the combination produces public interest benefits consistent with the purposes of the newspaper/broadcast cross-ownership rule.

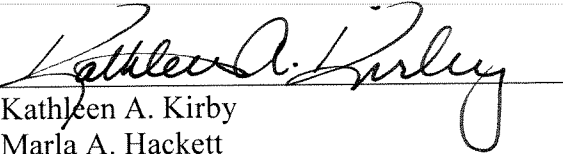
⁵⁰ *Competitive Telecomms. Ass'n v. FCC*, 87 F.3d 522, 529 (D.C. Cir. 1996) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)); see also, *California Metro Mobile Commc'ns, Inc. v. FCC*, 365 F.3d 38, 43 (D.C. Cir. 2004); *Atlantic Tele-Network, Inc. v. FCC*, 59 F.3d 1384, 1388-89 (D.C. Cir. 1995).

⁵¹ 2008 Order at ¶ 77; see also, *id.* at ¶ 40, *id.* at n. 133, *id.* at n. 252.

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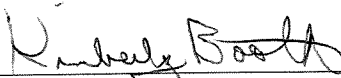
Its Attorneys

Dated: May 6, 2008

CERTIFICATE OF SERVICE

I, Kimberly Booth, in the law firm of Wiley Rein LLP, do hereby certify that I have on this 6th day of May, 2008, caused to be mailed by first class mail, postage prepaid, copies of the foregoing "**Opposition to Petition for Reconsideration**" to the following:

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